Covenant Homecare *and* Teresa P. Rector. Case 10–CA–31593

May 23, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On January 14, 2000, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Jeffrey D. Williams, Esq., for the General Counsel.
Jeffery W. Bell, Esq. (Ford & Harrison), of Atlanta, Georgia, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 18, 1999, in Knoxville, Tennessee. After the parties rested, I heard oral argument, and on November 19, 1999, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[2]

CONCLUSION OF LAW

Based on the entire record, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Respondent has not violated the Act in any manner alleged in the complaint as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected.]

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JUDGE LOCKE: On the record.

This is a bench decision in the case of Covenant Homecare and Teresa P. Rector, Case 10–CA–31593. It began on March 29, 1999 when Ms. Rector, whom I will call the "Charging Party," filed an unfair labor practice charge against Covenant Homecare, which I will call the "Company" or the "Respondent." The Company has admitted that it was served with a copy of the charge on March 30, 1999. Based on Respondent's admissions I find that the charge was filed and served as alleged.

After an investigation, the Regional Director for Region 10 of the National Labor Relations Board, which I will call the "Board," issued a Complaint against Respondent on July 30, 1999. In issuing this Complaint, the Regional Director acted for and on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or the "Government."

The complaint alleged that on or about September 30, 1998, Respondent discharged Teresa P. Rector and five other employees named in the complaint, that it did so because its employees engaged in concerted protected activities and to discourage other employees from engaging in such activities, and that the discharges violated Section 8(a)(1) of the National Labor Relations Act.

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In its Answer, Respondent has admitted that it discharged the six employees as alleged in the Complaint, but it has denied that it took this action for the alleged discriminatory purpose, and it also denied violating the National Labor Relations Act.

On November 18, 1999, I conducted a hearing in this matter in Knoxville, Tennessee. At the close of proof, counsel for the General Counsel and for the Respondent gave oral argument and today, November 19, 1999, I am issuing this bench decision.

For the reasons I will discuss, I find that the government has not established that Respondent violated the Act in discharging the six employees and, therefore, recommend that the Board dismiss the complaint.

Undisputed Allegations

Before discussing the issues in controversy I will first make findings of fact on the undisputed allegations, based on the admissions in the Respondent's answer to the complaint.

Respondent has admitted that it is a Tennessee Corporation with an office and place of business in Knoxville, Tennessee, and that it has been engaged in the business of providing in–home patient health and hospice care. I so find.

Respondent also has admitted that, during the 12–month preceding issuance of the complaint on July 30, 1999, in conducting the business operations I have just described, it derived gross revenues valued in excess of $250,000.00

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings, we note that there is insufficient evidence of disparate treatment.

[2] The bench decision appears in uncorrected form at pp. 246–259 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this Certification.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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and purchased and received, directly from outside the State of Tennessee, goods valued in excess of $50,000.00. I so find.

Further, Respondent has admitted, and I find, that at all material times it has been an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act.

Respondent also has admitted that at all material times Ethel Owens held the position of Director of Human Resources and was a supervisor and Agent of Respondent within the meaning of Sections 2(11) and 2(13) of the Act respectively. I so find.

Additionally, Respondent has admitted that on or about September 30, 1998, it discharged the following employees: Teresa P. Rector, Betty Tallent, Stephanie Hamill, Cynthia Rockey, Michael Newheart, and Andrea Rogers. Based on Respondent's admissions in the record as a whole I so find.

Disputed Allegations

Because Respondent has admitted discharging these employees, the main issue before me concerns the lawfulness of the discharges which in turn depends upon Respondent's motivation. From the testimony of the various witnesses a remarkably consistent picture emerges. The employees who were discharged were all social workers. Their jobs involved visiting the homes of patients, making a social work assessment of each patient's needs, and taking action to meet those needs. For

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example, a social worker might contact a resource in the community to arrange special services for a patient.

Because of recent changes in the Company's organizational structure, many of the social workers experienced feelings of insecurity about their jobs. This insecurity involved both a fear of job loss, resulting from downsizing, and concern about who supervised their work and how that supervision affected it.

Respondent employed persons in other professions, notably nursing, to perform other services for homebound patients. For a considerable time Respondent employed a separate supervisor, a social worker herself, to oversee the social workers.

Apparently for efficiency, it eliminated the social worker supervisor and placed the social workers under the same supervisors as the visiting nurses. This change lasted a number of months but apparently proved unsatisfactory. For reasons which are not entirely clear on the record, management decided to reinstate the position of social worker supervisor.

In the abstract such a change would be unlikely to evoke a negative reaction among the social workers who felt more comfortable reporting to someone in their own profession than to a nurse. However, Respondent's choice of a person to fill this position, and the way it went about this choice, did result in some dissention.

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The record indicates that Respondent made no announcement in advance that it was creating the position of social worker supervisor and did not give the social workers an opportunity to apply for the job. Rather, it selected and appointed a person and then announced it.

Moreover, a number of social workers were concerned that Respondent had filled the job with a person less experienced than themselves. Additionally, some social workers were concerned about the possibility that Respondent had discriminated on the basis of sex or age. The person selected was a man and younger than some of the social workers who were not selected.

On September 21, 1998, the social workers had to attend a meeting at Respondent's Offices in Knoxville. Because they worked in various locations in a number of counties, this meeting produced the unusual situation of the social workers coming together in one place.

The six social workers named as discriminatees in the Complaint, as well as at least two other social workers who were not named in the Complaint, decided to have their own meeting after the official one. The private meeting took place in the home of the Charging Party.

It began between 10:30 and 11:00 a.m., probably closer to 11:00, on September 21, 1998. It lasted about an hour. At this meeting the social workers discussed the possibility of

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age or sex discrimination, the qualifications of the person selected to be their supervisor, and what they should do.

At the end of the meeting, at least one person made a comment concerning how they should record the time spent in the meeting on their time sheets. These sheets use a numerical code system to describe what the employee was doing.

Notwithstanding testimony that the social workers did not have a "discussion" concerning what time code should be used, no witness denied that this subject came up. Whether or not the comments about time sheets satisfied the definition of "discussion," from the testimony and demeanor of the witnesses I have no doubt that the social workers were concerned about the code they used to record their time because it might reveal that they had attended this unofficial meeting.

A week later the person selected to be social worker supervisor learned about the meeting from a social worker who attended it. This social worker, Sharie Arnold, advised the social worker supervisor, Bobby Brown, that she was concerned about how the social workers reported the time spent in the meeting on their time sheets. Supervisor Brown relayed this information to higher Management, which began an inquiry. Also on September 28, 1998, social worker Arnold prepared a memo concerning the meeting which she had earlier described to Supervisor Brown.

This memorandum, addressed to two Management officials, is

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in evidence as Respondent's Exhibit 1. It list by name seven social workers who attended this meeting, including the six identified in the Complaint as alleged discriminatees.

The Arnold memo reported that no patient–related issues were discussed in the meeting. It also stated "several options were suggested at the end of the meeting to use for documenting the time used for this meeting."

The next day, members of management conducted meetings individually with each of the involved social workers. The day after that, September 30, 1998, Respondent discharged the six social workers named in the Complaint and one other social worker.

In each case, Respondent's stated reason for the termination of employment was that the social worker had falsified the time record for September 21, 1998. The time records, which are in evidence, disclose the following:

Teresa Rector had logged portions of the meeting as Code 15 (signifying a lunch or break) and the remaining portion as Code

9 (signifying patient documentation). Stephanie Hamill logged all of the time during the meeting as Code 2 (case coordination).

Cynthia Rockey also logged the meeting as Code 2 (case coordination). Michael Newheart logged part of the meeting as Code 1 (signifying travel/non-visit) and the remainder as Code 2 (case coordination). Andrea Rogers

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logged part of the time spent during this meeting as Code 1 (for travel) and part as Code 15 (for lunch or break). Betty Tallent logged separate portions of the time as Code 29 (meaning scheduling), Code 2 (care coordination) and Code 3 (care plan).

I find that at the time of the discharges, Respondent's management had considered evidence showing that the social workers had entered false time codes on their time sheets. Further, I find that Respondent did not have any information which reasonably would undermine or contradict its conclusion that these employees had made false entries on their time sheets.

Before it discharged these workers, Respondent also knew that they had met on September 21, 1998 at Ms. Rector's home. The September 28, 1998 memorandum from social worker Arnold clearly establishes that knowledge.

Moreover, I find that the credible evidence establishes that the management officials who made the discharge decisions were aware that, during their meeting on September 21, 1998, the social workers were discussing Respondent's appointment of Bobby Brown to be their new supervisor and what to do about it.

To determine whether the discharges are violative, I must analyze the facts under the Board's *Wright Line* framework which involves a sequential examination of the evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). At the first step, the government must show that the alleged discriminatees had engaged in Union or other concerted activities protected by the Act.

The evidence establishes that the discriminatees attended

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the meeting on September 21, 1998, at which they discussed matters related to terms and conditions of employment.

Further, I find that their activity was concerted activity protected by Section 7 of the Act. Therefore, I conclude that the evidence satisfies the requirements of the first step of the *Wright Line* analysis.

Next, the General Counsel must show that Respondent was aware of the employees' protected activities. The September 28, 1998 Arnold memorandum and uncontradicted testimony establish that the management officials who made the discharge decisions knew about the protected activities of the employees they terminated. Therefore, I find that Step 2 of the *Wright Line* test has been satisfied.

The Government must also show that Respondent took an adverse employment action. Respondent has admitted that it terminated the employment of the alleged discriminatees. I find that this third part of the *Wright Line* test has been satisfied.

Finally, the General Counsel must demonstrate a connection between the protected activity of the employees and the adverse employment action taken against them. There is no evidence to establish that Management discharged the social workers because of what they discussed at the September 21, 1998 meeting in Ms. Rector's home.

Similarly, there is no direct evidence that management

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discharged these employees because they had a meeting. For example, no one testified that any supervisor or manager made any statement connecting the discharge decision with the fact that employees had acted in concert or had discussed working conditions.

To prove a link between the protected activity and the adverse employment action the government must, in this case, rely upon whatever inference may be drawn from the facts. The timing of events, for example, may provide the basis for such an inference in appropriate cases. However, I do not believe this to be an appropriate case.

The Respondent certainly acted swiftly on September 28, 1998 when it learned about the social workers' meeting and how they had coded their time sheets. Thus, the next day, September 29, Respondent conducted interviews of the involved employees, and on September 30, 1998 it discharged the employees.

Other circumstances besides timing, however, call into question what significance logically may be inferred from the speed of Respondent's action. If the employees had attended a Union organizing meeting or if they had decided at their meeting to take some specific action, such as contacting a lawyer or Government Agency to pursue a discrimination claim, then the speed of the discharges might be interpreted as management's attempt to nip that action in the bud.

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In this case, however, the social workers did not agree during their September 21, 1998 meeting to take any specific action. They just talked about working conditions.

Perhaps, if the record contained other evidence showing management's hostility towards discussion of working conditions by employees, it would be reasonable to conclude that the swiftness of the discharges reflected Management's antipathy to such discussions. However, the record does not suggest that the Respondent had any such dislike of employee discussions. Therefore, I do not draw any inference from the timing of the discharges.

I find that the government has not proven the fourth *Wright Line* requirement. Therefore, I conclude that the General Counsel has not met his burden of proof.

However, even assuming that the government had established what formerly was called a prima facia case, I would conclude that Respondent had demonstrated that it would have taken the same action against these employees in any case, and regardless of their protected activities or lack of protected activities.

Respondent presented credible evidence showing a consistent pattern of discharging employees who had falsified their time sheets. This evidence is particularly persuasive when considered with the Respondent's possible motivations for making such discharges.

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To accept the General Counsel's theory, I must assume that the Respondent felt so threatened by employees having one meeting which might be called a "gripe session" that it was willing to terminate most of its social worker compliment to

keep such meetings from happening again. That does not sound like plausible conduct, particularly because Respondent had just decided that the social worker position was important enough to deserve a separate supervisor.

On the other hand Respondent's asserted motivation is highly plausible. Management feared and wished to avoid a federal investigation concerning Medicare fraud. An investigation might result from any irregularity in time records.

Considering the vigor with which the federal government, through its Office of Inspector General of the Department of Health and Human Services—as well as the agencies of the Department of Justice—pursue health care fraud allegations, it is very reasonable to believe the claim that management officials did not want to do anything which could result in an investigation.

It also may be noted that apart from a criminal investigation, the government also may inquire administratively into perceived irregularities in billing under Medicare. Such an inquiry may result in delayed reimbursement of Medicare

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claims. The prospect of such a cash flow problem also could motivate the management of a home health agency to make and enforce a zero tolerance policy concerning employees misreporting their time usage.

In sum, no evidence suggests any management fear or loathing of employee "gripe sessions," but credible evidence does suggest management acted out of fear that time reporting irregularities could cause a federal investigation. The fact that Respondent decided not to bill Medicare for any time on the time sheets affected by the misreporting further demonstrates management's concern.

The General Counsel has argued that evidence shows Respondent did not always come down hard on employees who misreported time on their time sheets. To reach such a conclusion I must consider all the evidence presented at the hearing, and not merely the information which was available to Management officials when they made the discharge decisions. Such hindsight would not be appropriate. I must decide management's motivation based upon the knowledge available to management officials at the time they took the action.

In sum I conclude that the Government has failed to prove

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the violations it alleged, and I recommend that the Complaint be dismissed.

After the transcript is prepared and served on the parties and on me I will prepare a certification of bench decision. Attached to that certification will be the portions of the transcript which

record the bench decision I have just given. When my certification of bench decision issues, it will be served upon the parties, and it will be that event, the service on the Parties, which will begin the period for filing an appeal.

I have been tremendously impressed by the civility and the professionalism of counsel in this matter and am very grateful for how smoothly and cooperatively the evidence has been presented. Thank you. The hearing is closed.